

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MIC:DET:TL-N-2993-00  
MTHammoud

date:

to: Chief, Appeals Division, Michigan District  
Attn: Ted Stein, Appeals Team Chief

from: District Counsel, Michigan District, Detroit

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subject: [REDACTED] FSC Liquidation  
Consent to Extend the Statute

This memorandum is in response to your recent request for our advice with regard to the above subject.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgement of the office with jurisdiction over the case.

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ISSUE

Who is the proper party to execute a consent to extend the statute of limitations for assessment, Form 872, on behalf of a dissolved and non-existent foreign sales corporation, the majority of whose assets were transferred to its parent corporation?

### CONCLUSION

Since neither the foreign sales corporation nor any of its officers/directors are any longer in existence, a consent (Form 872) cannot be obtained. Accordingly, it is recommended a notice of deficiency be mailed to the taxpayer's last known address prior to the statute's expiration on [REDACTED].<sup>1</sup>

### FACTS

The facts are as set forth in your memorandum dated May 18, 2000, and as subsequently updated by you on May 23 and June 1, 2000.

The Michigan Appeals Office is currently considering the [REDACTED] and [REDACTED] tax years relating to [REDACTED] (now [REDACTED]). During those years, [REDACTED] wholly owned [REDACTED], (hereinafter [REDACTED]), a Delaware corporation. Also during those years, [REDACTED] owned a foreign sales corporation, [REDACTED] (hereinafter FSC), a U.S. Virgin Islands Corporation. [REDACTED] filed a consolidated return with [REDACTED] for these years, but since the FSC was a foreign entity, it was not included in the consolidated return.

In [REDACTED], [REDACTED], including the FSC, was sold to its managers/officers. [REDACTED] continued its existence after the sale. Sometime between [REDACTED] and the present, the FSC was dissolved pursuant to U.S. Virgin Islands law, and its assets transferred to [REDACTED]. No trustees were appointed for the FSC, and no officers of the FSC can be currently located.

A consent to extend the statute of limitations was obtained from the FSC around [REDACTED]. This consent, which expires on [REDACTED], was executed by a then current officer of the FSC.

Pursuant to our discussions with Appeals Team Chief Ted

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<sup>1</sup> If it appears the examination of the foreign sales corporation may result in an overpayment, we recommend the taxpayer be advised as soon as possible to file a protective claim for refund.

Stein, it is our understanding [REDACTED] is willing to accept responsibility for any potential tax liability of the FSC, and has in fact executed a Transferee Agreement, Form 2045, (hereinafter Form 2045), along with a Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary. It is our further understanding the tax examination of the FSC may ultimately result in an overpayment.<sup>2</sup>

### DISCUSSION AND ANALYSIS

As a general rule, tax must be assessed within 3 years of the filing date of the return. I.R.C. § 6501(a). However, pursuant to I.R.C. § 6501(c)(4), the Internal Revenue Service and the taxpayer may consent in writing to extend the time for making an assessment. Internal Revenue Code section 6061 provides that any return, statement, or document made under the internal revenue laws must be signed in accordance with the applicable forms or regulations.

Determination of who may act on behalf of a dissolved corporation depends on the law of the jurisdiction where the corporation was incorporated and dissolved. See, Field v. Commissioner, 286 F.2d 960 (6<sup>th</sup> Cir. 1960); Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3<sup>rd</sup> Cir. 1978); and Associates Investment Co., v. Commissioner, 59 T.C. 441 (1972).

In pertinent part, 13 Virgin Islands Code Annotated section 285 provides as follows:

All corporations, whether they expire of their own limitations or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending actions by or against them ...

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<sup>2</sup> Due to the unavailability of the examination work papers, we have received conflicting information regarding whether the examination of the FSC will result in a deficiency or an overpayment. Initially, we were informed a deficiency will result, but later told an overpayment will result. However, based on our June 15, 2000, discussion with Mr. Stein, it now appears likely the examination of the FSC will result in a deficiency.

In pertinent part, 13 Virgin Islands Code Annotated section 286 provides as follows:

(a) Upon the dissolution in any manner of any corporation the directors then in office shall be liquidating trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts as far as such money and property shall enable them ...

(b) The directors, constituted liquidating trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation, and shall be suable by the same name, or in their own names or individual capacities for the debts owing by such corporation, and shall be jointly and severally responsible for such debts,...

Section 287 of 13 Virgin Islands Code Annotated authorizes a district court, on application of any creditor or stockholder, to appoint one or more persons as receivers of the corporation, with full authority to act for and on behalf of the corporation.

Pursuant to the above provisions, only an appointed receiver or corporate director may be authorized to act on behalf of a dissolved corporation during its "winding up" period. Accordingly, since the FSC in this case was dissolved without anyone being appointed trustee, and considering the fact that none of the officers/directors can be located, a consent may not be obtained. As a result, the statutory notice of deficiency should be mailed to all known addresses of the FSC prior to [REDACTED].

Although [REDACTED] executed a Form 2045 obligating itself as a transferee, as well as a Form 977 to extend the statute, such forms are not valid for extending the statute against the FSC transferor, as the statute of the transferor is separate and distinct from that of the transferee. I.R.C. § 6901(c). These forms, however, may be helpful in assisting the Internal Revenue Service in pursuing a transferee liability case against [REDACTED] pursuant to I.R.C. § 6901.<sup>3</sup>

In addition, although IRM section 22.2.16(3) authorizes the Commissioner to obtain a Form 2045 from a transferee in exchange for not pursuing any further action against the transferor, we do not recommend sole reliance on the Form 2045, as a court may deem such form as only mere evidence of transferee liability. Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367, 371 (1985), n.6.

We have coordinated this advice with our National Office and it concurs with our conclusion.

Should you have any questions or require any further assistance, please feel free to contact the undersigned at (313) 237-6432.

PHOEBE L. NEARING  
District Counsel

By: \_\_\_\_\_  
MESO T. HAMMOUD  
Assistant District Counsel

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<sup>3</sup> We note that pursuant to the provisions of I.R.C. § 6901(c)(1), the statute of limitations for a transferee expires one year after the statute of limitations for a transferor. Thus, notwithstanding the 150 days which may possibly be tacked on as a result of issuing the notice, the statute of limitations against [REDACTED] as a transferee will not expire until at least [REDACTED], the date set forth in the Form 977.